Supreme Court, U.S.
FILED
MAR 13 1987
JOSEPH F. SPANIOL, JR.
CLERK

Case No. 86-806

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

LAWRENCE E. JOSEPH, and
E. FRANK JOSEPH,
Respondents,

v

L. BROOKS PATTERSON, RICHARD THOMPSON, DAVID CASE, individually and in their capacities as Oakland County Prosecutors; JAMES A'HEARN and ROBERT LEON, individually and in their capacities as members of the Oakland County Prosecutor Office Investigation Division and/or of the Oakland County Organized Crime Strike Force; Jointly and Severally,
Petitioners.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO CERTIORARI

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STATEMENT OF THE CASE

As early as 1978, Defendant James A'Hearn, formerly a City of Birmingham police officer and presently Chief of the Oakland County Prosecutor's Investigative Division (Organized Crime Strike Force) began to approach third parties seeking information about Plaintiffs and their family, indicating Defendant A'Hearn's belief that Plaintiffs were associated with the "Mafia" and indicating that he wanted to "get" the Josephs. Defendant Richard Thompson, Chief Assistant to the Oakland County Prosecutor (Defendant L. Brooks Patterson) expressed the same sentiments to various third parties during the same period of time.

On March 14, 1980, using a minor altercation in which George Joseph, a younger brother of Plaintiffs herein, was involved with one Hal Morrow, the Prosecutor's Office entered into concerted action with

the City of Birmingham Police Department to bring criminal charges against Plaintiffs herein for "obstruction of justice" and "compounding a felony". The charges were based on the false claim that an otherwise legal and proper release of civil liability, obtained by Plaintiffs from Morrow, was in fact an attempt to obstruct justice and obtain the withdrawal of a criminal complaint against Plaintiffs' younger brother.

In pursuit of their objective, Defendant Prosecutors:

1. Caused private telephone conversations of Plaintiffs to be recorded by Morrow without Plaintiffs' knowledge in violation of Michigan law.

2. Directed Morrow to "play along" with Plaintiffs in an attempt to entrap Plaintiffs into some illegal activity.

3. Coerced Morrow into being a witness against Plaintiffs by threatening to pro-

secute Morrow himself if he attempted to withdraw his criminal complaint against the younger brother or refused to testify in the manufactured criminal proceedings against Plaintiffs.

4. Coerced Morrow by denying Morrow his right to consult with an attorney after a specific request (this was in a tape recorded session).

5. Coerced so-called "inculpatory" statements about Plaintiffs from Morrow.

Having forced Morrow into making false statements which might arguably support the issuance of a complaint and warrant against Plaintiffs, Defendant Prosecutors and their investigators deliberately ignored and refused to honor a properly issued writ of habeas corpus issued by the Honorable Augustus Cifelli of the 48th District Court, State of Michigan. Defendants' refusal was based on the false belief that Plaintiffs were in some fashion

"related" to Judge Cifelli. Defendant Prosecutor Thompson admittedly ordered the Chief of the Birmingham Police Department to ignore the writ of habeas corpus and instead transport the younger brother of Plaintiffs to another Judge in the same County to avoid any arraignment in front of "Uncle Gus".

Thereafter, by falsly swearing before an Oakland County Circuit Judge that said Judge was the only one available to act, Defendants wrongfully obtained the arraignment of the younger brother on an incarcerative bond, obtained arrest warrants for the Plaintiffs herein and obtained a search warrant for Plaintiff Lawrence Joseph's place of business, a supermarket. The falsely sworn basis for the search warrant was the ostensible need to recover the civil release which the Prosecutor claimed was the basis of an attempt to obstruct justice.

BEST AVA

Under the direction of Defendants, the search warrant was executed during business hours, but while Plaintiff Lawrence Joseph was being detained on the falsely sworn arrest warrant. The search was conducted in such a manner as to harass and terrify the employees and customers of Plaintiff Lawrence Joseph, to disrupt and damage his business premises and to extend into areas not authorized by said warrant and for purposes not envisaged within said warrant.

These specific allegations are not denied by Defendants and it is in fact admitted that at least a half dozen people participated in the search of the basement of the business premises attempting to find stolen liquor and cigarettes. They later falsely instigated an administrative investigation of the same allegations, even after no such contraband or untaxed goods were found.

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In addition to directing the destructive and overly extensive search of Plaintiff Lawrence Joseph's business premises based on a falsely sworn warrant, Defendants also caused the restaurant of Plaintiff R. Frank Joseph to be invaded without cause or legal process. There they arrested one of the Joseph sisters for no cause whatsoever, save to harm the restaurant business and illegally detain Plaintiffs' relatives.

After the events described above, all of which occurred on March 14, 1980, Defendants instituted and falsely maintained a malicious prosecution of Plaintiffs herein for "obstruction of justice" and "compounding a felony". The charges were dismissed at a preliminary examination by the District Court Judge and Defendants appealed said dismissal to the Oakland County Circuit Court, where the dismissal was upheld. Thereafter, Defendants appealed

the dismissal to the Michigan State Court of Appeals, where the dismissals were again upheld. No charges were ever lodged against the detained sister.

Even after the dismissal of the criminal charges was upheld by the Court of Appeals in Michigan, Defendants herein continued to oppose the expungement of Plaintiffs' criminal records and the return of their photographs and fingerprint cards at the trial court level.

The felonious assault charge against the younger brother, George Joseph, which the witness Morrow pursued under threat of prosecution by Defendants, was ultimately dismissed.

After the events referred to on March 14, 1980, Defendant Thompson sought to utilize his authority as Chief Assistant Prosecutor of Oakland County to deny Plaintiff Lawrence Joseph a renewal of his permit to carry a concealed weapon, which

permit had been continuously held by Plaintiff Lawrence Joseph more than twelve years. Defendant Thompson ordered Defendant Case, an Assistant Oakland County Prosecutor who sat as the only permanent member of the Oakland County Concealed Weapons Licensing Board, to investigate why Plaintiff Lawrence Joseph possessed a general concealed weapons permit and to deny a renewal of that permit at the regularly appointed renewal date of July, 1982. It has been proven that Defendant Case in fact used his position as the Oakland County Prosecutor's permanent designee to said Board to "flag" Plaintiff Lawrence Joseph's concealed weapons licensing file. In August, 1982, Defendant Case did in fact induce said Concealed Weapons Licensing Board to reduce Plaintiff Lawrence Joseph's concealed weapons permit from a general permit to a restricted permit.

BEST AVA

However, the actions of the Prosecutor were so unusual in the case that Captain Billy Nolin, who respresented the Oakland County Sheriff on the Board, reported the "flagging" and brought about its exposure.

Plaintiff Lawrence Joseph appealed the administrative decision and the Oakland County Circuit Court ruled on March 7, 1984 (after the dismissal of the instant case below) that the Concealed Weapons Licensing Board improperly and without any basis denied Plaintiff Lawlrence Joseph's request for renewal of his general concealed weapons permit. The Court further found that the actions of the Board violated Plaintiff Joseph's due process rights in the licensing procedure by selectively applying new and different standards and policies to Plaintiff Joseph without affording him any notice of said "change in standards" or any opportunity to meet or comply with them.

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Plaintiff Joseph contends that this entire episode with Concealed Weapons Licensing Board was an attempt by the Defendant to arrest, prosecute and convict him of a weapons violation. Such a conviction would lead to the revocation of his various liquor licenses, thereby forcing him out of his lawfully conducted supermarket business.

For the purpose of evaluating a Motion to Dismiss, the above facts must be regarded as true. Walker Process Equipment, Inc. v Food Machinery and Chemical Corp, 382 US 172 (1965). The claim should not be dismissed unless it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Conley v Gibson. 355 US 41 (1957). The same presumptions should apply in determining whether petitioners here are entitled to absolute immunity.

However, the record in the trial court was not well developed and the decision of the Sixth Circuit below in substantial part called for a remand for a specific determination of facts.

This uncertain state of the record occurred because, on the day before trial, all Defendants related to the original codefendants from the City of Birmingham settled with Plaintiffs and the case against them was dismissed. On the day of trial, February 2, 1984, the Trial Court heard arguments for the first time on the Defendants' Motions for Summary Judgment based on prosecutorial immunity. Defendants Patterson, Thomson, Case, A'Hearn and Leon had filed the motions after the completion of discovery. The motions were not accompanied by affidavits. There was no extensive briefing or response by Plaintiffs. The District Court entered an oral opinion dismissing all federal claims

against the three prosecutors based on absolute immunity pursuant to Imbler v Pachtman, 424 US 409, 96 S Ct 984, 47 L Ed 2d 128 (1976). Although the Court did not explicitly extend the absolute immunity afforded to the prosecutors herein to the two investigators who were employed by the prosecutor's office, the trial court accomplished the same objective by dismissing all federal claims against said investigators based on the Court's unspecified finding of the insufficiency of the facts pled by Plaintiffs against them.

The Court's Order of Dismissal was entered on March 12, 1984. The Order did not specify the factual and legal basis on which the Court acted, save by adversion to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Neither did the Order of Dismissal distinguish between those Oakland County Defendants who were in fact attorneys and those who were investigators

employed by the prosecutor's office. Finally, the Order of Dismissal did not advert to or incorporate by reference any oral opinion or fact-finding by the Court.

REASONS FOR DENYING THE WRIT:

I.

THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT PROPERLY DECIDED THE ISSUE OF THE SCOPE OF ABOSLUTE PROSECUTORIAL IMMUNITY WITHIN THE DICTATES OF IMBLER V PACHTMAN CONCERNING INVESTIGATIVE ACTIVITIES PRIOR TO THE BRINGING OF CHARGES AND, THERE BEING NO DIRECT CONFLICT BETWEEN THE DECISION BELOW AND THE DECISIONS IN OTHER CIRCUIT COURTS OF APPEAL, THERE IS NO NECESSITY FOR THIS COURT TO SETTLE ANY QUESTION RELATING THERETO.

The opinion of the Sixth Circuit below has thoughtfully and carefully addressed all of the issues raised by Petitioners herein, although the Sixth Circuit specifically found that "these facts are not well-developed in the record...." (App. A-21 Petition). The essential thrust of the Petition For Certiorari herein is to ask this Court to extend absolute prosecutorial immunity to all investigative activities engaged in by a prosecutor. Although lip service is paid to the issues of "quasi-judicial" versus "administrative or investigative" work, "advocatory" ver-

sus "non-advocatory" activity and "prior" versus "post" institution of criminal process activities, the conclusion which the Petition urges is that prosecutors should be absolutely immune from civil liability from any and all investigatory activity which either results in the initiation of criminal charges or might reasonably have so resulted.

Respondents suggest that this Court should decline to grant the Petition as presently postured. Respondents do not deny that the issue of prosecutorial immunity is an important one. Neither do they deny that certain questions were specifically left open by this Court's decision in Imbler v Pachtman, supra at 431. Further, Respondents do not deny that the District Courts and Circuit Courts of Appeal below have delineated the parameters of absolute prosecutorial immunity by ap-

plying differing tests and constructs over the decade that Imbler has been in force.

However, these circumstances alone do not make out a sufficient reason for granting the Petition pursuant to Rule 17 of this Court inasmuch as there does not appear to be any direct conflict between the decisions of the Courts of Appeal below. Rather, there seems only to be a multiplicity of approaches to the various factual situations which have arisen.

Consequently, the question before this Court is whether or not this case presents an opportunity to more rigorously define the limits of absolute prosecutorial immunity. Respondents suggest that the various opinions below do not conflict with each other and that the courts have been able to apply the dictates of Imbler with relative consistency. Further, Respondents suggest that the record in the instant case is not amenable in its present state

to a thoughtful and comprehensive consideration of the question.

It is helpful to quickly review the substantive holdings of the Sixth Circuit. On the issue of the prosecutor's investigatory interview with the witness Morrow, the opinion below distinguished between the investigative function and the decision to initiate prosecution. The Court below further distinguished between the investigative interviewing of witnesses and the interviewing of witnesses in preparation for the presentation of evidence at trial. Having set forth the competing policy concerns, the Court below found the record insufficient and remanded the case for further development in the District Court (Petition App. A-11 & 12).

Regarding the Plaintiffs' complaints of abuse of process, manipulation of the courts and false swearing in the seeking of the arrest warrants, the opinion below

surveyed the eight most relevant decisions in the lower courts since the decision in Imbler in 1976. Based on that review, the Court below specifically determined that the seeking of complaints and arrest warrants was clearly a part of the decision to institute a criminal prosecution and was therefore entitled to absolute immunity, regardless of the prosecutorial misconduct. (App. A-12 & 13)

Regarding the false swearing of applications for search warrants to be used as a pretext for invading Plaintiffs' businesses to pursue the investigation of unrelated, but suspected criminal activity, followed by the actual direction of and participation in the resultant search, the Court below followed the same thoughtful pattern, of surveying and construing the relevant post-Imbler decisions. The opinion below then adopted the reasoning of a long line of cases, both before and after

Imbler that these investigatory searches were not absolutely protected activity (Petition App. A-13 through A-15).

The prosecutorial activity of appealing the dismissal of the charges against the Respondents in state court was found to be absolutely immune (A-15). The issue of the Prosecutor's opposition to the expungement of Respondents' criminal record was found to be insufficiently developed and was remanded for futher determinations (A-19 through 21). The activities of the investigators in the prosecutor's office was held not to be absolutely immune inasmuch as they went beyond "ministerial actions intimately related to the judicial process pursuant to the express direction and control of the Prosecutor" (Petition App. A-21).

Petitioners cannot fairly characterize the careful and multi-faceted decision of the Sixth Circuit below to be clearly er-

roneous or to have substantially "departed from the accepted and usual course of judicial proceedings." Supreme Court Rule 17.1(a). Consequently, Petitioners are forced to characterize the decision below merely as an important one which should be settled by this Court. It should be noted that Petitioners cannot even point out any direct conflict between the decsion below and those of any other Circuit Court of Appeal.

Respondents do not believe that this case presents an opportunity for this Court to halt the thoughtful development of opinion on the limits of absolute prosecutorial immunity as it has proceeded since the Imbler decision. Respondents contend that the real thrust of this Petition is to press the proposition that all prosecutorial investigative activity is absolutely protected so long as it actually or might reasonably lead to criminal

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prosecution. To be sure, such a rule would eliminate the necessity for much of the careful balancing and thoughtful analysis demonstrated by the Sixth Circuit below. The Petitioners desire for such a prophylactic and categorical rule is natural and expedient. However, civil rights and constitutional liberties rarely fit comfortably on such a Procrustean bed.

Respondents suggest that the relative paucity of prosecutorial immunity cases in the decade since Imbler is an indication that this problem is not deeply troubling the courts and prosecutors of the land. Respondents have found no instance in which it has been alleged that prosecutorial resolve has been weakened by the spectre of civil liability.

Most of the post-Imbler cases which have considered the question of absolute immunity for prosecutorial investigative activities have used the "functional"

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test, i.e. - where the prosecutor performs functions traditionally and usually performed by policemen, then he is outside the ambit of his quasi-judicial role. Please see Hampton v Hanrahan, 600 F2d 600 (7th Cir 1979); Forsyth v Kleindienst, 599 F2d 1203 (3rd Cir 1979); Jacobson v Rose, 592 F2d 515 (9th Cir 1978); Marrero v City of Hialeah, 625 F2d 498 (5th Cir 1980); Helstoski v Goldstein, 552 F2d 564 (3rd Cir 1977); Higgs v Florey, 713 P2d 840 (Colo 1986); Rex v Teeples, 453 F2d 840 (1985); McSurely v McClellan, 697 F2d 309 (DC Cir 1982).

This approach has been criticized as narrow and mechanical in "Comment", Section 1983 and Prosecutorial Immunity, 19 Amer. Crim. L. Rev. 81 (1981). The "functional" approach was dissected, categorized and implicitly criticized in "Note", Supplementing the Functional Test of Pro-

secutorial Immunity, 34 Stan. L. Rev. 487 (1982).

The cases and the commentators have attempted to categorize or analyze prosecutorial misconduct in terms of the stage of the procedings at which it occurs. When is Prosecutor Entitled to Absolute Immunity from Civil Suit for Damages under 42 USCS Section 1983: Post-Imbler Cases, 67 ALR Fed. 640. The Second Circuit is said to have created the "harm" test in Lee v Willins, 617 F2d 320 (2nd Cir 1980) and Taylor v Kavanagh, 640 F2d 650 (2nd Cir 1981). The "harm" test ostensibly turns on the question of whether or not the harm suffered by the citizen arises independently of the judicial process. It arguably provides broader protection for the prosecutor than the "functional" test.

However, these varying approaches have generally been tailored to the specific factual situations before the courts be-

low. It cannot be said that there is a tendency to be protective of the prosecutor to the point of encouraging abuse of the office. Conversely, it cannot be said that the courts have been anxious to narrowly circumscribe absolute immunity and expose the prosecutor to numerous frivolous, vexatious proceedings. While Respondents do not put it beyond the ken of this Court to further fashion or refine the basic Imbler doctrine, there does not seem to be a compelling reason to do so.

Finally, Respondents point out that the immunization of all investigative activities which ultimately result in the initiation of criminal prosecutions opens the way toward two dangerous propositions. First, such an extension of absolute prosecutorial immunity will immediately focus attention on how far that immunity should be extended to investigators employed directly by the prosecutor's office, as op-

posed to the qualified immunity accorded other law enforcement officials. There have been some cursory decisions tending in that direction already. Please see Freeman v Hittle, 708 F2d 442 (9th Cir 1983) and Atkins v Lanning, 556 F2d 485 (10th Cir 1977). If the prosecutor's investigator is merely carrying out "ministerial acts" or acts which have been specifically directed by an absolutely immune prosecutor, one line of reasoning would indicate that the investigator should also be absolutely immune. Respondents contend that this is a dangerous path on which to embark.

Second, if the subsequent initiation of a criminal prosecution can operate to immunize post facto violations of civil liberties committed by prosecutors during the investigatory phase, the miscreant prosecutor will be encouraged to immunize his investigatory transgressions by bring-

ing unfounded charges. Again, Respondents suggest that the present case-by-case factual analysis which has been undertaken by the lower courts since Imbler is a wiser course.

II.

THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT PROPERLY HELD THAT PETITIONER CASE WAS NOT ENTITLED TO ABSOLUTE IMMUNITY AS A MEMBER OF THE OAKLAND COUNTY CONCEALED WEAPONS LICENSING BOARD.

The primary thrust of Petitioner Case's argument that the Sixth Circuit erroneously decided below that he was not entitled to absolute immunity in his position as a member of the Oakland County Concealed Weapons Licensing Board is that the Sixth Circuit erroneously assumed that said Board was not covered by the provisions of the Michigan Administrative Procedures Act. Cf.-Hanselman v Wayne County Weapon Board, 419 Mich. 168 (1984). Petitioner Case points out that under the aegis of Hanselman v Killeen, 112 Mich F275 (1982), Respondent Lawrence Joseph in fact appealed the restriction of his general concealed weapons permit pursuant to said Michigan APA (MCL 28.426). Please see App. C of the Petition herein.

Respondent Joseph admits that he did utilize the Michigan APA to twice appeal the wrongful acts committed by Petitioner Case at the direction of Petitioner Thompson in restricting Joseph's concealed weapons permit. However, Respondent Joseph contends that the entire record of Joseph v Oakland County Concealed Weapons Licensing Board, Oakland County Civil Action 82-247153 AA (Mich) will reveal that your Respondent had to contend with procedures which were substantially out of conformity with said Michigan APA. There was no record kept, no reasons given and no adversarial process involved in the original restriction of Joseph's permit. A voluntary remand from the state circuit court to the Board was had wherein the licensing hearing was repeated. Although Joseph presented a facially valid case for an unrestricted permit, it was still denied without reasons being entered on the record.

During the subsequent administrative appeal, counsel for the Concealed Weapons Licensing Board indicated that the change in Respondent Joseph's license occurred as a result of a change in the standards by which licenses are granted by the Board. However, it was admitted that there was no written change in policy and no notice given of any such change.

Petitioner Joseph had to seek the extraordinary relief of being allowed to take the deposition of a Board member within the course of an administrative appeal, and to further be allowed to inspect the entire records of the Concealed Weapons Licensing Board for a three year period, in order to disprove the false contention in the administrative appeal that the Board had somehow "changed its standards." It was only after this arduous and extraordinary process that it was conclusively proven that the change in Respondent Jo-

seph's license had been brought about solely at the insistence of Petitioner Case, acting on the directions of Petitioner Thompson. The conspiracy between Thompson and Case took place outside of and in advance of the actual administrative licensing review itself.

Respondent Joseph contends that there are no comparable administrative actions or appeals within Michigan jurisprudence. The wrongful action of Petitioner Case in compromising his lawful duty to fairly treat those who appeared before him in his administrative capacity was imposed upon Petitioner Case as a condition of his employment by Petitioner Thompson. None of the usual administrative procedures and safeguards applied. Petitioners Case and Thompson's actions can in no fashion be characterized as quasi-judicial in this instance.

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In addtion, Respondent Joseph points out that the subsequent Michigan Supreme Court decision in Hanselman v Wayne County Weapon Board, supra eliminates even the protections under the Michigan APA which were accorded to him in his concealed weapons license case. The opinion below was entirely correct in withholding absolute immunity from Petitioner Case as a member of the Board.

On a broader policy level, this Court's decision in Cleavinger v Saxner, 106 S Ct 496 (1985) militates against extending absolute immunity to the members of state and local licensing boards. These bodies have different functions than those of administrative review boards or the administrative law judges who decide matters of administrative prosecution or other adverse action. The Court reviewed in Cleavinger, id. at pages 500 and 501, the governmental officials to whom quasi-

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judicial or absolute immunity has been extended. Nowhere has it been extended to the members of state or local boards which carry out regulatory or licensing functions. Indeed, Cleavinger reemphasizes the "rare and exceptional character of absolute immunity."Id. at 501.

The leading case in this area is Butz v Economou, 438 US 478, 98 S Ct. 2894 (1978). Cleavinger summarizes the Butz factors for determining the propriety of absolute immunity for officials who carry out adjudicative public functions. Those factors are:

> (a) the need to assure that the individual can perform his functions without harassment or intimidation; (b) the presence of safeguards that reduce the need for private damages actions as a means of controlling unconstitutional conduct; (c) insulation from political influence; (d) the importance of precedent; (e) the adversary nature of the process; and (f) the correctability of error on appeal." Cleavinger, supra at 501.

In analysing the functioning of a county concealed weapons licensing board in Mich-

igan against the above standards, it is clear that the businessmen and other eligible citizens who might need concealed weapons are unlikely to attempt to harrass or intimidate the members of such boards. At present in Michigan there are no safeguards that reduce the need for private damage actions as a means of controlling unconstitutional conduct. There is no indication that concealed weapons board members need to be insulated from political influence. Indeed, the membership of such boards is rotated, with representatives from the Michigan State Police, the county prosecutor's office and the county sherrif's office filling the three permanent spots at the will and direction of their individual agencies.

Precedent has little importance in these matters inasmuch as there is no recorded body of decisions before such boards collected on either a local or statewide ba-

sis. The process is nonadversarial inasmuch as the board is never represented by counsel in its everyday proceedings and the individual applicants are rarely represented.

The possibility of correctability on appeal of wrongful decisions by said boards now exists only in the form of common law or equitable writs, attempting to overcome the strong presumption of validity and administrative regularity.

Consequently, under the Butz and Cleavinger standards, Petitioners have little basis on which to claim that the Sixth Circuit erred in refusing to accord Petitioner Case absolute immunity for his bad faith and unconstitutional actions regarding Respondent Joseph.

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that this Petition for a Writ of Certiorari be denied.

Respectfully Submitted,
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